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GOVERNMENT BY INJUNCTION.

It is very plain that the last word has not yet been said on so-called "government by injunction." [1] The question will continue to excite public attention until the newly-drawn line is sufficiently well defined for the average citizen to be able to determine when and how his right to trial by jury can be taken away from him by a judge, or bench of judges. It must be conceded that the intensity characteristic of all the relations of life at the present time makes the demand for such a remedy very urgent.

All of the decisions, beginning with the famous one of the *United States* v. *Debs*,[2] are a departure from the teachings of text-books, and in so far as they hold that courts of equity now have the right to trespass upon the administration of the criminal law are in conflict with all of the recognized ancient precedents, and are not warranted by any new State or Federal statute.

The fact that the remedy by criminal prosecution may be inadequate in the particular case in which relief is sought may be undeniable, but heretofore it has never been thought that such a condition justified the making of law to suit the emergency by the judicial rather than the legislative department of the government. There is such a provision in the famous Code Napoleon. Article 4 of the Preliminary Title of the present French Civil Code, which article remains unchanged as Napoleon promulgated it on the 18th of March, 1803, provides that "A judge who refuses to render judgment under pretence that the law is silent, obscure or insufficient, may be prosecuted as being guilty of denying justice." [3] But the very next article expressly forbids judges from deciding cases submitted to them "by way of general and settled decisions." Therefore it can be readily seen that

[1] See a very able article on that subject in *The Law Quarterly Review* for October, 1897. Stevens & Sons, limited, 119 and 120 Chancery Lane, London.

[2] 64 Fed. Rep. 724; 158 U. S. 564.

[3] French Civil Code, translated by Henry Cachard (1895), p. 2.

the theory of the law with the French people is directly opposed to that upon which all of our famous decisions are built. We rely upon precedent; they reject it absolutely. It is the established practice in Virginia that courts will not of their own motion overturn precedents, and that relief must be sought, if desired, from the legislature.[1] This is doubtless the law of all the States as well as of the United States, notwithstanding the now celebrated Debs case, which is itself not founded upon precedent. The real ground of that decision is stated by Mr. Justice Brewer.

"If," said he, delivering the opinion of the court, "all the inhabitants of a State, or even a great body of them, should combine to obstruct interstate commerce or the transportation of the mails, prosecutions for such offences had in such community would be doomed in advance to failure. And if the certainty of such failure was known, and the national government had no other way to enforce the freedom of interstate commerce and the transportation of the mails than by prosecution and punishment for interference therewith, the whole interests of the nation in these respects would be at the absolute mercy of a portion of the inhabitants of that single State" (p. 582).

In such an emergency no one questions the right of the government to use the army to enforce the laws. But, says the court, "is the army the only instrument by which rights of the public can be enforced and the peace of the nation preserved?" Now it is admitted that a jury could not be found to convict, even if a grand jury would indict in such a supposed case. The object, then, of the modern "government by injunction" is to get a speedy conviction and sentence to prison without the aid of a jury, and in a mode not heretofore prescribed by law. The court thinks the government deserves praise for asserting its rights by injunction rather than "the club of the policeman and the bayonet of the soldier." But it is submitted that the question is not whether the government acted humanely, but whether it did so lawfully. It is an elementary proposition of law that courts of equity have no jurisdiction to restrain the commission of crimes.[2] No one doubts that Debs himself was engaged in a flagrant violation of law.

"The strong repugnance which every law-abiding citizen must feel for acts of lawlessness renders the task of criticising proceedings designed to preserve order somewhat invidious . . . . Debs, who for a time posed as supreme arbiter over the welfare of millions of his fellow citizens, was in fact aken red-handed in a flagrant and audacious defiance of the laws, and merited the most severe punish-

[1] Johnson v. Chesapeake & Ohio Ry. Co., 91 Va. 173, decided March 14, 1895.

[2] High on Inj. (3rd Ed.) secs. 20 and 27.

ment which the penal statutes authorized. But for the very reason that law and order were thus outraged, it was the more necessary to see that the measures of repression used were fully warranted. It is no light matter that suspicion even should rest upon the judiciary of warping principles to meet the supposed exigencies of cases as to which the strongest passions of the community are aroused." [1]

A great writer[2] on equity jurisprudence advocates the extension of the remedy in cases of trespass beyond what the courts would formerly grant. He says:

"While the same formula is employed by the courts of equity in defining their jurisdiction, the jurisdiction itself has practically been enlarged; judges have been brought to see and to acknowledge, contrary to the opinion held by Chancellor Kent, that the common law theory of not interfering with persons until they shall have actually committed a wrong, is fundamentally erroneous; and that a remedy which prevents a threatened wrong is in its essential nature better than a remedy which permits the wrong to be done, and then attempts to pay for it by the pecuniary damages which a jury may assess. The ideal remedy in any perfect system of administering justice would be that which absolutely precludes the commission of a wrong, not that which awards punishment or satisfaction for a wrong after it is committed."

This is the personal view of the celebrated author entirely unsupported by authority. If it should be accepted as sound it would carry with it the right of judges and courts to lay down general rules for the government of the community, to declare *ex cathedra*, in advance of any contentious proceedings in which the question arises, what may and what may not lawfully be done, to impose on the whole community a duty to refrain from doing a certain act, and thereby invade the legislative domain and take from it one of its most importa functions. But even this great writer never once advocated the use of equity jurisdiction to restrain the commission of crimes. The first case referred to by the United States Supreme Court in the Debs opinion, *Stamford* v. *Stamford Horse Railway Co.*, 56 Conn. 381, was not a case in which an injunction was awarded to restrain the commission of a crime but to prevent a nuisance, which has always been regarded as a proper subject of equity jurisdiction.

The other cases cited are like the case above referred to and it is fair to say that the court does not point to a single precedent which may be considered on all fours with the case it determined.

It might have referred to the English case of *Springhead Spinning Company* v. *Riley*, which was decided in 1868,[3] as sustaining its view,

[1] *Law Quarterly Review* for October, 1897, p. 366.
[2] 3 Pomeroy Eq. sec. 1357.
[3] L. R. 6 Eq. 551.

but it did not, very likely because the court of appeals very severely condemned that opinion. In that case the defendants were officers of a trades union, and they gave notice to workmen, by placards, etc., that they were not to take work with the plaintiff, and the bill alleged that this intimidated the workmen and injured the value of the plaintiff's property. On demurrer, although the acts of the defendant, as alleged, amounted to a crime under the English statute, the court interfered by injunction to restrain such acts, inasmuch as they were also an infringement of property rights. But this decision has not since been followed, the remedy there being commonly by indictment of the offending persons, which preserves their right of trial by jury. Recently, however, as will later on appear, it is claimed that since the consolidation of law and equity procedure in 1873, the courts of England have such power in consequence of the passage of that act.[1] Criminal jurisdiction in equity had been used in the time of King Henry VI, when the Chancellor would award a subpœna against "a great man to keep the peace."[2] This criminal jurisdiction has not been revived in England by courts of equity unaided by statute. American courts of equity are charged with having seized and exercised jurisdiction improperly in two ways; first, by attempting to restrain acts in their nature purely criminal, and punishing persons for contempt accused of those acts, and second, attempting to restrain persons, whether parties to the suit or not and whether identified or not, from committing crimes, thereby issuing legislative decrees.

Springhead Spinning Co. v. *Riley* (L. R. 6 Eq. 557) is the only case prior to the Judicature Act of 1873, since the time of King Henry VI, in which an injunction was used as it was in the Debs case, and when it is remembered that that unfortunate King died many years before the discovery of America, it will readily be seen what a gap of centuries there is between the time the court of equity claimed jurisdiction for the prevention of crimes and the time it resumed its abandoned power. In the argument of that case for the defendants it was asserted by counsel "that the relief sought by this bill is of an entirely novel character, and there is no case in which such an injunction has ever been granted" (p. 554), citing Lord Eldon in *Gee* v. *Pritchard*, 2 Swanston, 402, 413, where that great judge held that the court had no power to award an injunction restraining the commission of a crime.

[1] Handbook Labor Law, U. S. Stimson, p. 319.

[2] 1 Spence's Eq. Jurisp. p. 343.

Sir R. Malins, Vice-Chancellor, decided the case, and in doing so used this language:

"The jurisdiction of this court is to protect property, and it will interfere by injunction to stay any proceedings, whether connected with crimes or not, which go to the immediate or tend to the ultimate destruction of property, or to make it less valuable or comfortable for use or occupation."

But the Court of Appeals directly overruled this case of the *Springhead Spinning Co.* v. *Riley*, in *Prudential Assurance Company* v. *Knott*,[1] where Lord Cairns and Sir W. M. James both delivered opinions, in which they both expressly decided that the statement of the law by Vice-Chancellor Malins was not correct.

Sir W. M. James, Lord Justice, used this strong language about V. C. Malins' now famous opinion:

"I think that the Vice-Chancellor, Malins, in that case of *Dixon* v. *Holden*[2] (*Dixon* v. *Holden* was a case deciding the same question which had been raised in *Springhead Spinning Co.* v. *Riley* the year previous), was, by his desire to do what was right, led to exaggerate the jurisdiction of this court in a manner for which there was no authority in any reported case and no foundation in principle. I think it right to say, that I hold without doubt, that the statement of the law in that case is not correct."

To which Sir G. Mellish, L. J., added, "I also am entirely of the same opinion." This great case of the *Prudential Assurance Company* v. *Knott* was decided January 20, 1875, by the English Chancery Court of last resort, but since that time the right to restrain the commission of a crime in that country by injunction has been asserted again as a consequence of the fusion of law and equity procedure. In certain libel cases an act of Parliment has been passed, authorizing relief againt the publishing of libellous matter. It is also asserted that this power is derived from the Judicature Act of 1873[3] for the prevention of the publication of "atrocious" libels. Folkhard, in the 6th edition of his admirable work on Libel and Slander (Ed. 1897, p. 579), says:

"It is, however, abundantly clear that apart from such alleged statutory power, there is no principle of law nor rule of equity upon which to found such a jurisdiction. The ground upon which the court is empowered to interfere before trial in the case of a false and injurious publication is in the protection of property; and therefore, where a publication (whether libellous or not) is calculated to inflict some wrongful and substantial injury to the property or manufactures of the plaintiff, it may be restrained by interlocutory injunction."

The right to grant injunctions against libellous publications where

[1] L. R. 10 Ch. p. 142, 147.

[2] L. R. 7 Eq. 488 (1869).

[3] Quartz Hill Gold Mining Co. v. Beall, 20 Ch. D. 501.

there is no injury to property even alleged and to punish this violation by process of contempt, was never claimed nor exercised until 1882, and the court of last resort expressly holds that this extension of the jurisdiction is wholly of statutory origin and one of the consequences of the consolidation of law and equity procedure which was accomplished in England in 1873, and not contemplated by the originators of that splendid reform, but due to the peculiar wording of the Common Law Procedure Act of 1854.[1]

The United States Supreme Court has put its decision on the ground that it derived its authority from the Constitution of the United States, for when it recognized equity procedure it gave to that court the peculiar form of power now claimed and exercised. This cannot be a sound contention if the court accepts as its guide the equity powers known and exercised by the Court of Chancery in England at the date of the adoption of the Federal Constitution. The allegation in the opinion that it was a public nuisance which the court was attempting to abate is a mere pretext, for under that view any rebellion, outbreak or insurrection could be dealt with by the process of contempt.

The United States Supreme Court is evidently not in harmony with the English Court of last resort on this important question of "government by injunction," because prior to the first Wednesday in March, 1789, it neither claimed nor exercised such jurisdiction, and it is certain that the Debs decision is a departure from the established doctrines of equity. Indeed this is admitted by some writers. In the note to that case in 2 American and English Decisions in Equity, pp. 410, 411, the editor says:

"The remedies in the criminal and common law courts having proved inadequate to restrain the evils consequent on a strike, or to afford adequate compensation for the injuries occasioned thereby, courts of equity have of recent years extended the province of the remedy by injunction to cover such cases on the ground of protecting the property rights of the employers from irreparable injury. This has been vigorously inveighed against by certain well-meaning but injudicious theorists who forget that the world moves, and that we must keep peace with it, or be lost. If the fact of irreparable injury be properly made out, therefore, equity will enjoin strikers from enforcing a boycott."

This is a frank admission and a clear statement of the position of the courts exercising such jurisdiction. It is historically correct, for the courts never originally asserted or exercised any such power. It is practically new legislation of judges who have invaded a department of the government which they have no right to do under our constitu-

[1] Folkhard on the Law of Slander and Libel. (6th Ed.) pp. 580 *et seq.*

tion and laws. If the remedies are insufficient as the law provides, it certainly cannot seriously be contended that the judges and courts can usurp the functions of the legislature and make laws to suit particular emergencies. If they have such power in one case they have it in all, and there is an end of the American theory of government.

The use of injunctions for the prevention of crimes has been practised in Massachusetts, but when the question was last up on appeal the decision was by a divided court. It arose in *Vegelahn* v. *Guntner* (October 27, 1896).[1] Chief Justice Field and Holmes, J., dissented, and both expressed their views in able opinions. The question was whether the maintenance of a patrol of two men in front of plaintiff's premises, in furtherance of a conspiracy to prevent, whether by threats and intimidation, or by pursuasion and social pressure, any workmen from entering or continuing in his employment, would be enjoined, though such workmen were not under contract to work for plaintiff. In his dissenting opinion, Chief Justice Field said:

"In England the rights of employer and employed, with reference to strikes, boycotts and other similar movements has not, in general, been left to be worked out by the courts from common law principles, but statutes from time to time have been passed, defining what may and what may not be permitted. The administration of these statutes has largely been through the criminal courts . . . . In the present case, if the establishment of a patrol is using intimidation or force, within the meaning of our statute, it is illegal and criminal. If it does not amount to intimidation or force, but is carried to such a degree as to interfere with the use by the plaintiff of his property, it may be illegal and actionable. But something more is necessary to justify issuing an injunction. If it is in violation of any ordinance of the city regulating the use of streets, there may be a prosecution for that, and the police can enforce the ordinance; but if it is merely a peaceful mode of finding out the persons who intend to enter the plaintiff's premises, to apply for work, and of informing them of the actual facts of the case, in order to induce them not to enter the plaintiff's employment, in the absence of any statute relating to the subject, I doubt if it is illegal, and I see no ground for issuing an injunction against it."

Judge Oliver Wendell Holmes gets at the real controversy and goes to the heart of it, in his dissenting opinion:

"It is plain," says he, "from the slightest consideration of practical affairs, or the most superficial reading of industrial history, that free competition means combination, and that the organization of the world, now going on so fast, means an ever-increasing might and scope of combination. It seems to me futile to set our faces against this tendency. Whether beneficial on the whole, as I think it, or detrimental, it is inevitable, unless the fundamental axioms of society, and even the fundamental conditions of life, are to be changed.

[1] 44 N. E. 1077.

"One of the eternal conflicts out of which life is made up is that between the effort of every man to get the most he can for his services; and that of society, disguised under the name of capital, to get his services for the least possible return. Combination on the one side is potent and powerful. Combination on the other side is the necessary and desirable counterpart, if the battle is to be carried on in a fair and equal way. . . . . I can remember when many people thought that, apart from violence and breach of contract, strikes were wicked, as organized refusals to work. I suppose that intelligent economists and legislators have given up that notion to-day. I feel pretty confident that they will equally abandon the idea that an organized refusal by workmen of social intercourse with a man who shall enter their antagonist's employ is unlawful, if it is dissociated from any threat of violence and is made for the sole object of prevailing, if possible, in a contest with their employer, about the rate of wages."

The law is in an unsettled state in England as well as this country, although in the former country trades unions are recognized, and their right to strike permitted by act of Parliament.

Yet in the most recent case which has reached the court of last resort there,[1] which came up on the construction of the strike act, Lindley, L. J., said:

"I do not hesitate to say that it is a case in which from the necessity of the thing a quick remedy is actually and absolutely required, and therefore the injunction is awarded."

Kay, L. J., puts his decision upon the ground of the broadening effect of the Judicature Act of 1873. He says:

"I will begin by saying that since the Judicature Act, at any rate, there can be no doubt whatsoever of the jurisdiction of the court to grant an interlocutory injunction like this, which has been granted by North, J."

It was a case where picketing was used to pursuade persons not to enter into certain employment. The injunction was awarded as follows:

"An injunction to restrain defendants, their servants or agents, from watching or besetting plaintiff's works for the purpose of pursuading or otherwise preventing persons from working for them, or for any purpose except merely to obtain or communicate information."

This was an interlocutory injunction, but as all of the judges delivered opinions, it may be looked upon as the final judgment of the English court of chancery. It follows the *Debs Case*, and there was no question about the fact that the judges were of the opinion that this decision was rendered possible in consequence of the fusion of law and equity procedure.

In the argument of the case it was pointed out that this decision

[1] 1 Ch. (1896) 811, 827.

had the effect of punishing persons before trial and without a jury, by a judge.

The attitude of the courts now is that of permitting such blanket injunctions, and the only question is whether the public will continue to tolerate such usurped jurisdiction, and whether it should.

The chancellor exercising such functions is acting for the legislative, the executive and judicial departments at the same time. That the judge should have power to punish for contempt and disobedience no one will deny, but that such power should be construed to cover the cases of strikes and to attach to persons not parties, and who could not be made parties, is a serious matter.

Whether the people will concede such tremendous power to the judges and courts as the blanket injunction is a matter of grave doubt. In the State of Kansas a statute has already been passed entitled, "An Act to establish trial by jury in cases of contempt of court and restricting the power of judges and courts in contempt proceedings." [1]

By it the offence is divided into two classes: contempts committed in the presence of the court and contempts not committed in the presence of the court. The law as to the former is left untouched, but as to the latter the power of the court is so hampered as to be almost destroyed. Summary punishment or restraint of liberty upon *ex parte* affidavits is abolished. The officer must return the process and show that it has been disobeyed; then an attachment may issue and the person be arrested and brought before the court. When this is done, a written accusation must be filed, in the nature of an indictment, which the accused is required to answer at a time and place fixed by order of the court; and if the accused answers, the trial proceeds as in criminal cases, where the accused is confronted by the witnesses in the presence of the jury. He has also a right of appeal. The right of appeal destroys the jurisdiction of the court in that State, because it takes away from it the power to use force *at the time* it may be necessary to put down a mob or strike by that means.

It seems that this statute has gone too far, for such a power is really desirable under many circumstances to put in force the will of the government as expressed by duly enacted laws.[2]

[1] 18th Session, Laws of Kansas (1897), p. 205.

[2] Section 5 of the Kansas law, which went into effect May 8, 1897, is as follows: "The testimony taken on the trial of any accusation of contempt shall be preserved, and any judgment of conviction therefor may be reviewed upon the direct appeal to, or by writ of error from, the Supreme Court, and affirmed, reviewed or modified as justice may require. Upon allowance of an appeal or writ of error, execution of the judgment shall be stayed upon the giving of such bond as may be required by the court or a judge thereof, or by any justice of the Supreme Court."

As the law is administered where there is no statute on the subject, it is clearly an abuse of the powers of the court, and where such omnibus injunctions are issued the tendency is to sap the belief of the people in the courts and the government. No one who is a good citizen can fail to sympathize with any man who is denied the protection of the law, and if the process of injunction is abused for the purpose of putting down legitimate strikes, public sympathy will veer to the side of the strikers. General discontent is the best of signs, and it is a healthy symptom for persons to constantly seek to better their condition.

The reasoning of the court of last resort in England in this connection is deserving of the most serious consideration. Very properly it does not claim any such inherent power, but says that the original jurisdiction was enlarged by the fusion of law and equity procedure. Whether this is a sound construction of that statute or not it is logically and historically beyond criticism, because if the court there has any such power it has been conferred upon it by Parliament.

The reasoning of the American courts is unsound, because the new jurisdiction is claimed as a matter of expediency. If what is expedient is proper, then there is no end to the jurisdiction of any court.

In Virginia the legislature has so far regulated the proceedings in contempt cases, that the power of the courts is not very dangerous for contempts committed in their presence. Nor have the courts and judges ever abused the power. But for what would be known under the Kansas law as indirect contempts the Virginia statute is very broad and the courts have great power.[1] The chief limitation on it is that the fine can only be imposed when the accused person is present or has been served with a rule to show cause why he should not be fined or imprisoned and has failed to answer.[2]

There is no reported case in which the Supreme Court of Appeals has attempted to issue any omnibus injunction such as is exciting so much comment all over the country.

But there is nothing in the Virginia statutes prohibiting it to do so, should the majority of the court be of opinion in any particular case that "government by injunction" is expedient.

It is certain that if it is necessary for modern courts of equity to have such power, that it should be conferred upon them by the legislature. If they follow unquestioned precedents upon this most important subject, they are at present without any such jurisdiction; if they are

[1] Code of Va. (1887), section 3768, 3771.

[2] Id., section 4104.

allowed to establish a new power, in so far as they succeed they will have usurped the functions of the legislative department of the government. Everyone is interested in maintaining respect for the courts and upholding the laws, and no judge has any right to depart from the proper constitutional limitations on his official actions. It may be conceded that such a quick remedy is needed, but the relief should come from the legislature, and not from the courts.

Since the time of Cromwell, English speaking people have developed an intense antipathy to a standing army "and a widespread distrust of men of extreme views,"[1] and may not those judges, who make a remedy unknown to the law for an emergency, subject themselves to the same distrust?

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GENERAL CONTRACTUAL POWERS OF MARRIED WOMEN UNDER VIRGINIA CODE OF 1887.

Chapter 103 of the Virginia Code, regulating the rights and capacities of married women, and popularly known as the "Married Woman's Law," is drawn with admirable skill and clearness, save in defining the general contractual powers of the wife. By the expression "general contractual powers" is meant the powers of the wife to make contracts not in any manner connected with her business, trade, labor, services, or her separate estate, nor expressly upon the faith and credit thereof.

The wife's powers of contract are thus defined by section 2288, certain clauses of which are italicized for convenient reference hereafter.

"She may make contracts, as if sole, *in respect to* such trade, business, labor, services, and her said separate estate, OR *upon the faith and credit thereof;* and upon such contracts, and as to all matters connected with, relating to or affecting such trade, business, labor, services or separate estate, and upon contracts and liabilities incurred before her marriage, she may sue and be sued in the same manner, and there shall be the same remedies in respect thereof, for and against her and her said estate, as if she were unmarried."

The legal consequences of the valid exercise of these powers are thus prescribed by section 2289:

"In any case in which a married woman may sue or be sued under the pro-

[1] Taswell-Langmead's English Const. Hist. (5th ed.) p. 510.